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No.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term 1981

CITY OF POLSON, MONTANA,

Petitioner,

v.

CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION, MONTANA, et al.

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the original Flathead Indian Reservation in Montana, as established in 1855, was disestablished by the Act of April 23, 1904, 33 Stat. 302.

2. Whether the Hell Gate Treaty of 1855, which established the Flathead Indian Reservation, conveyed beneficial title to the bed and banks of the south half of Flathead Lake to the tribes of that reservation, thereby defeating the title of the future State of Montana to all navigable waterways.

3. Whether owners of land riparian to the south half of the Flathead Reservation own water to the low water mark.

4. Whether an Indian tribe has the authority to regulate the use of the bed and banks of navigable waters within an original reservation by non-Indian owners of riparian lands.

Only the first listed question will be discussed in this Petition. The other questions are fully discussed in the separate Petition for Writ of Certiorari filed by the State of Montana and the Namens, and the City adopts and incorporates the arguments made in that Petition by reference herein.

LIST OF PARTIES BELOW

The parties to the proceedings in the Court of Appeals were the City of Polson, the State of Montana, the United States, the Confederated Salish and Kootenai Tribes, Tribal Chairman Thomas E. Pablo, James M. Namen, Barbara J. Namen, A. J. Namen, and Kathryn Namen.

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The Petitioner, City of Polson, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on January 11, 1982.

OPINIONS BELOW

The District Court issued its first opinion in this litigation on August 14, 1974. This opinion, reported at 380 F. Supp. 452, was affirmed by the Court of Appeals on May 12, 1976, in an opinion reported at 534 F.2d 1376. A petition for writ of certiorari from this judgment was later denied by this Court. 429 U.S. 929 (1976). A subsequent memorandum decision was issued by the District Court on September 20, 1979. This unreported decision was fully incorporated in the District Court's third opinion of April 8, 1980, which is also unreported. The opinion of the Court of Appeals from which review is sought was entered on January 11, 1982, and is reported at 665 F.2d 951. A timely filed petition for rehearing with suggestion that rehearing be en banc was denied on March 10, 1982. The preceding decisions are reproduced as Appendices A-E to the Petition for Writ of Certiorari filed by the State of Montana and the Namens in this matter, which Appendix is incorporated herein by reference.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The judgment of the Court of Appeals was entered on January 11, 1982. A timely filed petition for rehearing was denied on March 10, 1982. The time for filing this petition was extended to July 1, 1982, by order of Justice Rehnquist dated May 20, 1982. The Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND REGULATIONS INVOLVED

Because of their length, the Treaty of Hell Gate, 12 Stat. 975 (1855), and the Act of April 23, 1904, 33 Stat. 302, are set forth in the Appendix to the petition of the State and the Namens as Appendices F and I.

Also involved are the following statutes which amended the Act of April 23, 1904: the Act of June 21, 1906, 34 Stat. 325, 353-54, and the Act of March 3, 1909, 35 Stat. 781, 795-96. Because of their length, the relevant portions of these statutes are appended separately to this Petition.

STATEMENT OF THE CASE

The issue of the status of the original Flathead Reservation was initially considered by the District Court in Confederated Salish and Kootenai Tribes v. Namen,

380 F. Supp. 452 (D. Mont. 1974) (State App. D),[1] aff'd, 534 F.2d 1376 (9th Cir.) (State App. E), cert. denied, 429 U.S. 929 (1976). Relying on the decision in Mattz v. Arnett, 412 U.S. 481 (1973), the court stated in a footnote that the original reservation existed to the full extent of its pre-1904 boundaries. 380 F. Supp. at 457 n.5. Subsequently, the City of Polson in 1975 brought a declaratory judgment action against the Tribes, seeking a redetermination of the issue of reservation status. Jurisdiction was invoked under 28 U.S.C. § 1331(a). In 1977, the United States sued the City and the State of Montana, requesting a declaratory judgment that the original reservation had not been disestablished by the Act of 1904. Jurisdiction for this complaint was based on 28 U.S.C. § 1345. These two actions were consolidated with the original Namen case.

On September 20, 1979, the District Court ruled that the 1855 Flathead Reservation had not been disestablished or diminished by the 1904 Act. Confederated Salish & Kootenai Tribes v. Namen, Civ. No. 2343 (D. Mont., September 20, 1979). This holding was incorporated in the court's final judgment of April 8, 1980. Confederated Salish & Kootenai Tribes v. Namen, Civ. No. 2343 (D. Mont., April 8, 1980) (State App. B). That part of the opinion relating to reservation status was

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1. Citations to "State App." refer to the Appendix submitted with the Petition for Certiorari filed by the State of Montana in this case.

affirmed by the Court of Appeals on January 11, 1982. Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951 (9th Cir. 1982) (State App. A). It is that decision which is the subject of this Petition.

The historic Flathead or Jocko Reservation in northwestern Montana was first established in 1855 by the Treaty of Hell Gate, 12 Stat. 975, and originally comprised approximately 1,245,000 acres. See, e.g., Confederated Salish & Kootenai Tribes v. United States, 437 F.2d 458, 460, 479 (Ct. Cl. 1971). In 1904, Congress enacted the statute in question which provided for the allotment of lands in severalty to individual Indians, and for the opening of the unallotted lands to public settlement and entry. Act of April 23, 1904, 33 Stat. 302. Approximately 227,000 acres were allotted to Indians under that Act. See, e.g., [1920] Comm'r Indian Affairs Ann. Rep. 91. In addition, some 45,000 acres were set aside for power and reservoir sites, 18,500 acres were set aside for the National Bison Range, and 60,000 additional acres were granted to the State of Montana for school purposes. See, e.g., Confederated Salish & Kootenai Tribes v. United States, supra at 479. Act of April 23, 1904, 33 Stat. at 303-04; Act of May 23, 1908, 35 Stat. 251, 267; Act of March 3, 1909, 35 Stat. 781, 796; Act of March 4, 1909, 35 Stat. 1039, 1051; [1920] Comm'r Indian Affairs Ann. Rep. 91.

Over one million acres remained for non-Indian entry and settlement under the homestead and townsite laws, and these lands were opened on May 2, 1910, pursuant

to the Presidential Proclamation of May 22, 1909. See 40 I.D. 57 (1910). The City of Polson is located on one of the original townsites established under the 1904 Act and the amendatory Act of June 21, 1906, 34 Stat. 325, 354.

Not all of the opened surplus lands were actually disposed of to settlers. A series of Orders of the Secretary of the Interior have restored a significant amount of land to tribal ownership and to reservation status pursuant to Sections 3 and 7 of the Indian Reorganization Act of 1934, 48 Stat. 984, 25 U.S.C. §§ 463 and 467. See Order of April 21, 1936, 1 Fed. Reg. 666; Order of December 11, 1937, 3 Fed. Reg. 5; Order of July 28, 1939, 4 Fed. Reg. 3581; Order of December 12, 1941, 7 Fed. Reg. 489; Order of March 3, 1942, 7 Fed. Reg. 2490; Order of August 29, 1956, 21 Fed. Reg. 6681; Order of May 28, 1958, 23 Fed. Reg. 3584; Order of May 4, 1961, 26 Fed. Reg. 4015; Order of December 2, 1964, 29 Fed. Reg. 16827. Consequently, some 615,000 acres, or about half of the original reservation, is held by the United States in trust for the Confederated Tribes and for individual Indians, and the remaining acreage is held in fee, primarily by non-Indians. See, e.g., Confederated Salish & Kootenai Tribes v. Namen, 380 F. Supp. 452, 457 n.5 (D. Mont. 1974) (State App. D). Only about 19% of the total population of the original reservation area consists of tribal members.

The dispute over reservation status arises in the context of the allocation of governmental jurisdiction

among state, local, federal, and tribal governments in the original Flathead Reservation area. Cf. DeCoteau v. District County Court, 420 U.S. 425, 427 n.2 (1975). The disposition of this case will in large part determine the extent to which the State of Montana and its political subdivisions may exercise jurisdiction over the area in question. A determination that the Flathead Reservation presently exists to the extent of its 1855 boundaries will divest the State and local governments of much of their civil, regulatory, and taxing authority within the area in question.[2] See, e.g., Bryan v. Itasca County, 426 U.S. 373 (1976); DeCoteau v. District County Court, supra at 427 n.2; McClanahan v. Arizona State Tax Commission, 412 U.S. 164 (1973). It is important to note that this jurisdictional dispute involves only lands within the original reservation boundaries which are not held in trust

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2. In 1965, the State assumed criminal jurisdiction over all lands within the original reservation which might be considered "Indian country," pursuant to Public Law 280, Act of August 15, 1953, 67 Stat. 590. See Mont. Rev. Codes §§ 83-801, et seq. The State would thus retain this jurisdiction regardless of reservation status. The State and its subdivisions, with the consent of the Tribes, also exercise civil jurisdiction over the following matters arising within the area in question: school attendance; public welfare; domestic relations (except adoptions); mental health and care of the infirm, aged, and afflicted; juvenile delinquency; adoption proceedings, when consented to by tribal court; abandoned, dependent, neglected, orphaned, and abused children; and the operation of motor vehicles on public streets and highways.

for the Tribes or individual Indians. The City acknowledges that those lands which were restored to reservation status pursuant to 25 U.S.C. § 467 presently constitute an Indian reservation, and that existing Indian trust allotments are "Indian Country" under 18 U.S.C. §1151(c) and therefore enjoy a similar status. See, e.g., DeCoteau supra at 427 n.2.

REASONS FOR GRANTING THE WRIT

I. THE DECISION OF THE COURT BELOW IS REPRESENTATIVE OF THE PRESENT CONFUSION REGARDING A RECURRING ISSUE OF NATIONAL IMPORTANCE

As will be demonstated below, the decision of the Ninth Circuit and its treatment of the 1904 Flathead Act appear to contradict the decision of this Court in Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977), regarding similar bills. Surplus lands acts of this type, which provide for an "opening" of reservation lands to non-Indian settlement, rather than an outright cession of lands to the United States, have been the subject of much confusion in the courts. See e.g., United States v. Dupris, 612 F.2d 319 (8th Cir. 1979), vacated mem., 446 U.S. 980 (1980); United States v. Long Elk, 565 F.2d 1032 (8th Cir. 1977); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977); United States ex rel. Condon v. Erickson, 478 F.2d 684 (8th Cir. 1973); City of New Town v. United States, 454 F.2d 121 (8th Cir. 1972); Ute Indian Tribe v. Utah, 521 F. Supp. 1072 (D. Utah 1981), appeal

docketed, No. 81-1901 (10th Cir., August 1981); State v. Janis, 317 N.W.2d 133 (S.D. 1982).

Although the Court's decision in Rosebud indicates that express language of cession is not required in order to disestablish an Indian reservation, the present confusion has arisen because of the existence of cession language in the earliest of the three statutes considered in Rosebud. There has been a considerable degree of uncertainty regarding the importance of that cession language to the Court's holding pertaining to the two non-cession statutes in Rosebud, with the result that lower courts have continued to emphasize the absence of explicit cession language in holding that similar surplus lands statutes did not have the effect of disestablishment. This problem of interpretation is of nationwide significance, because many such "sell and dispose" statutes involving millions of acres of land, were enacted in the early part of this century. See, e.g. Act of February 14, 1913, 37 Stat. 675; Act of May 11, 1912, 37 Stat. 111; Act of June 27, 1910, 36 Stat. 533; Act of June 1, 1910, 36 Stat. 455; Act of May 30, 1908, 35 Stat. 558; Act of May 29, 1908, 35 Stat. 460; Act of May 29, 1908, 35 Stat. 458; Act of March 1, 1907, 34 Stat. 1015, 1035; Act of June 21, 1906, 34 Stat. 325, 335; Act of June 5, 1906, 34 Stat. 213; Act of March 3, 1905, 33 Stat. 1048, 1069; Act of December 21, 1904, 33 Stat. 595.

Further guidance from this Court is therefore necessary to resolve the existing confusion, and to affirm and clarify the decision in Rosebud.

II. THE DECISION OF THE COURT BELOW CONFLICTS WITH THE DECISIONS OF THIS COURT.

A. An Examination of All the Relevant Factors, in Light of the Decisions of this Court, Leads to the Unmistakable Conclusion that Congress Intended To Disestablish the Original Flathead Reservation.

1. The Principles Applicable to Determinations of this Type.

At the heart of this case is the question of the proper approach to the construction of Indian surplus lands acts in light of the recent relevant decisions of this Court. See Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977); DeCoteau v. District County Court, 420 U.S. 425 (1975); Mattz v. Arnett, 412 U.S. 481 (1973). Each of these cases, like the instant case, involved statutes which provided for the opening of Indian reservation lands to non-Indian settlement, and all examined the question of whether the particular statutes resulted in the termination of the reservation status of the affected lands.

The principles applicable to inquiries of this kind were most recently stated by this Court in Rosebud Sioux Tribe v. Kneip, supra. As the Court stated, "[t]he mere fact that a reservation has been opened to settlement does not necessarily mean that the opened area has lost its reservation status." 430 U.S. at 586-87 (emphasis added). On the other hand, the intent of Congress controls, and "[i]n all cases, 'the face of the Act', the

'surrounding circumstances,' and the 'legislative history,' are to be examined with an eye toward determining what congressional intent was." Id. at 587.

2. An Examination of the Face of the 1904 Act, Its Legislative History, and the Surrounding Circumstances Clearly Demonstrates the Disestablishment Purpose of the Act.

a. The face of the 1904 Act.

The Flathead Act of 1904 provided for the survey of the reservation, the allotment of lands to individual Indians, the classification and appraisal of the surplus lands, and the opening of the remainder to settlement and entry under the homestead, mineral, and townsite laws. This Act contains no express language of disestablishment. On the other hand, the operative provisions of the Act do not differ in any material respect from other surplus lands statutes of the period which have been found to have the effect of disestablishment. See, e.g., Rosebud, supra at 608-09, 612-14 (1907 and 1910 Acts); Russ v. Wilkins, 624 F.2d 914 (9th Cir. 1980), cert. denied, 451 U.S. 908 (1981); United States ex rel. Cook v. Parkinson, 525 F.2d 120 (8th Cir. 1975), cert. denied, 430 U.S. 982 (1977). Moreover, the Flathead Act does not stand alone, but was enacted during the same week as three other surplus lands acts. Act of April 23, 1904, 33 Stat. 254; Act of April 27, 1904, 33 Stat. 319; Act of April 27, 1904, 33 Stat. 352. These include the 1904 Act construed by this Court in Rosebud and an

act pertaining to the Crow Reservation in Montana, which has also been held to have the effect of disestablishment. See Little Light v. Crist, 649 F.2d 682, 683, 686-90 (9th Cir. 1981); State v. Bad Horse, 602 P.2d 1113, 1117-18 (Mont. 1980); In Re Little Light, 598 P.2d 572, 573 (Mont. 1979). As this Court instructed with respect to the 1907 and 1910 Rosebud Acts, which bear a strong similarity to the Flathead Act, surplus lands statutes "must be considered in context." Rosebud, supra at 606 n.30. The context of the 1904 Flathead Act unquestionably includes the 1904 Rosebud and Crow Acts.

Two particular provisions of the Flathead Act strongly support a finding of disestablishment. One such provision is set forth in Section 8, which grants sections 16 and 36 of every township to the State of Montana for school purposes. 33 Stat. at 303-04. This Court has fully explained the significance of such a provision in its discussion of substantially identical provisions in the three Rosebud Acts. Rosebud at 599-601, 608 n.35. As the Court noted, the Enabling Act under which both Montana and South Dakota were admitted into the Union specified that the sixteenth and thirty-sixth sections of every township were to be granted to each State upon its admission, except that those sections then included within Indian reservations were not subject to the grant "until the reservation shall have been extinguished and such lands be restored to, and become a part of, the public domain." §10, Act of February 22, 1889, 25 Stat. 679 (emphasis added). See Rosebud at 599-600; Little Light

v. Crist, 649 F.2d 682, 689 n.9 (9th Cir. 1981) (appendix to opinion). Thus, for the Flathead Act, as for the Rosebud Act of the same date, the "natural construction . . . is to read a congressional intent to disestablish . . . , thereby making the sections available for disposition to the State . . . under §10 of the [Enabling Act]."[3] Rosebud at 601.

An additional section indicating a purpose of disestablishment is Section 21, added by a 1909 amendment to the Act.[4] Act of March 3, 1909, 35 Stat. 781, 795-96. This section subjected the allotted, retained, and surplus lands to a twenty-five-year prohibition against the introduction of intoxicants. It is virtually identical to §10 of the 1910 Rosebud Act, which was fully explicated in Rosebud, supra at 613.

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3. In the Flathead Act, as in the Rosebud Act," the legislative history . . . demonstrates that Congress 'included the provision to implement the grant in the enabling act and for no other reason.'" Rosebud at 600, quoting Rosebud Sioux Tribe v. Kneip, 521 F.2d 87 (8th Cir. 1975). Both the House and Senate Reports explicitly noted that the school lands provision of the Flathead legislation was "in accordance with the enabling act of Montana." H.R. Rep. No. 1678, 58th Cong., 2d Sess. at 2 (1904) (State App. J); S. Rep. No. 1930, 58th Cong., 2d Sess. at 3 (1904) (State App. K).

4. Other amendments to the 1904 Act were made in the following Acts: Act of March 3, 1905, 33 Stat. 1048, 1080-81; Act of June 21, 1906, 34 Stat. 325, 353-54; Act of May 29, 1908, 35 Stat. 444, 448-50; Act of April 12, 1910, 36 Stat. 296.

The importance of the Rosebud liquor provision was explained as follows:

> As there existed in 1910, an outstanding prohibition against the introduction of intoxicants into "Indian country," see Act of July 23, 1892, 27 Stat. 260, the most reasonable inference from the inclusion of this provision is that Congress was aware that the opened, unallotted areas would henceforth not be "Indian country," because not in the Reservation.

Id. at 613 (emphasis added) (footnote omitted). Because the section would have been entirely superfluous if the affected portion of the reservation had not been disestablished, such a provision indicates a clear intent on the part of Congress to disestablish the area involved. Rosebud, supra, at 614.

From the foregoing discussion, it is readily apparent that the 1904 Act, viewed as a whole, was intended to disestablish the original Flathead Reservation.

b. The circumstances surrounding the passage of the Act.

In inquiries of this kind, it is necessary to examine the statute in question in its proper historical setting and in light of the circumstances surrounding its enactment. See Rosebud, supra, at 586, 587; DeCoteau v. District County Court, supra, 420 U.S. at 444, 445. See also Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978). It is therefore important to consider the governmental policy respecting Indians which prevailed during the period in which the Flathead Act was passed. At that time, the federal Indian policy consisted of two

principal goals: the assimilation of the Indian population and the reduction of existing Indian reservations. See generally Montana v. United States, 450 U.S. 544, 559 n.9 (1981). As delineated in the Annual Reports of the Secretary of the Interior and the Commissioner of Indian Affairs, the policy of assimilation was to be accomplished primarily through allotment of tribal lands in severalty, education, and the destruction of tribal relations. See, e.g., [1891] Comm'r Indian Affairs Ann. Rep. 3-9, 26. At the same time, it was the policy of the federal government to reduce the amount of existing reservation lands in order to make the surplus lands — that is, the lands not needed by the Indians themselves — available for non-Indian settlement. See, e.g., [1892] Sec'y Interior Ann. Rep. VII-VIII, XXXIII. See also Montana v. United States, supra, at 559 n.9 (1981); Draper v. United States, 164 U.S. 240, 246 (1896); Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 102 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977).

Toward the end of the nineteenth century, the "familiar forces" described in Rosebud, supra, 430 U.S. at 590, and DeCoteau v. District County Court, supra, 420 U.S. at 431, had begun to create pressure for the opening of the surplus lands of the Flathead Reservation. In 1886, provision was made in the annual Indian appropriation act for funds to enable the Secretary of the Interior

> to negotiate with the various bands or tribes of Indians in Northern Montana . . . for a reduction in their respective reservations; or for removal therefrom to other reservations . . . .

Act of May 15, 1886, 24 Stat. 29, 44 (emphasis added). Although there is no record of any negotiations conducted under this Act, there can be little question that by the use of the word "reduction," Congress intended that any reservation lands ceded pursuant to this Act would have been disestablished. See Confederated Salish & Kootenai Tribes v. Namen, 665 F.2d 951, 955 (9th Cir. 1982).

In 1896, Congress authorized the Secretary of the Interior to appoint a commission

> to negotiate with the following Indians, namely: With the Crow and Flathead Indians in the State of Montana for the cession of portions of their respective reservations . . . .

Act of June 10, 1896, 29 Stat. 321, 341 (emphasis added). Although duly appointed commissioners conducted negotiations with the Indians on several occasions, no cession of lands was achieved. See, e.g., [1901] Comm'r Indian Affairs Ann. Rep. 49. Again, however, there is no doubt that had an agreement been reached under the 1896 Act, the ceded portion of the reservation would have been disestablished. Namen, supra, at 958. As the Court stated in DeCoteau, supra, language of cession is "precisely suited" to disestablishment. Id. at 445. See also Rosebud, supra, at 589 n.4, 592, 597; Little Light v. Crist, 649 F.2d 682, 685, 689 (9th Cir. 1981) (1904 Act ratifying Crow agreement reached under 1896 Act).

Thus, the 1886 and 1896 Acts reflect an "unmistakable baseline purpose of disestablishment" on the part of Congress. That this purpose was to be carried forward into a subsequent opening of the reservation is indicated by the 1901 negotiations conducted pursuant to the 1896 Act. The commissioners made it clear to the Indians that even if the Tribe did not agree to a cession, Congress would unilaterally open the reservation to non-Indian settlement, and that an agreement was advisable in order to ensure "a better deal." Proceedings of a General Council held with the Indians of the Flathead Reservation, April 3, 1901 at 2 (Tribes' District Ct. Ex. 8). Council with the Flatheads, January 3 and 4, 1901 at 8 (Tribes' District Ct. Ex. 7). No distinction was made between the effect of such a unilateral opening and a bilateral cession.

c. The legislative history of the 1904 Act.

In December, 1903, Representative Dixon of Montana introduced a bill providing for the survey and allotment of the lands, and for the opening of surplus lands not needed for allotment. H.R. 8324, 58th Cong., 2d Sess. (1903). The original version of the bill required the consent of a majority of the male adult Indians, and referred to "the tract herein ceded." Id., §§8, 17. Thus, the legislation is properly viewed as a continuation of earlier Congressional attempts at cession, with the same baseline purpose of disestablishment.

Although the consent provision and the cession language were deleted from subsequent versions of the bill, there is no indication that the underlying purpose of the bill was to have been altered. As the Congressional Committee reported, the final version of the bill was "substantially the same as" the first version. H.R. Rep. No. 1678, 58th Cong., 2d Sess. at 2 (1904) (State App. J); S. Rep. No. 1930, 58th Cong., 2d Sess. at 3 (1904) (State App. K). The consent provision was removed at the suggestion of the Secretary of the Interior, who stated that the bill would "fully safeguard and protect the rights and interests" of the Indians, and that there was "no occasion for presenting the matter to the Indians" for their consent. H.R. Rep. No. 1678, supra at 5; S. Rep. No. 1930, supra at 6. It must be remembered that in 1903, the Supreme Court had ruled that Congress could unilaterally alter reservation boundaries without the consent of the Indians. Lone Wolf v. Hitchcock, 187 U.S. 553 (1903). The "ceded" wording was also deleted at the suggestion of the Secretary, who objected to the technical misuse of the term. That is, the surplus lands were not actually to be "ceded" to the federal government for resale to settlers, but were to be opened for direct sale to homesteaders, the government acting only as trustee. See, e.g., Rosebud at 596-97. Although the word "ceded" was therefore later deleted, its presence in the original legislation is nevertheless reflective of an intent to disestablish. See Rosebud at 597.

The final revision of the bill, H.R. 12231, was passed by both houses of Congress, with minimal debate, in April 1904. 38 Cong. Rec. 4199-4200, 4992, 5582. Although the legislative history of the bill is somewhat sparse, the absence of any extensive legislative discussion is easily understandable in light of the fact that the Flathead bill was only one of several surplus land bills simultaneously before Congress. As noted above, in one week of April, 1904, four bills were enacted which opened all or parts of the following reservations: the original Flathead Reservation (Act of April 23, 1904, 33 Stat. 302), the Rosebud Reservation in South Dakota (Act of April 23, 1904, 33 Stat. 254), the Devils Lake Reservation in North Dakota (Act of April 27, 1904, 33 Stat. 319), and the Crow Reservation in Montana (Act of April 27, 1904, 33 Stat. 352). All of the four bills provided for the allotment of lands in severalty and the opening and sale of the surplus lands. The only notable difference between the Flathead Act and the others is that the Rosebud, Crow, and Devils Lake Acts were unilateral modifications of preceding cession agreements, while there was no cession agreement preceding the Flathead Act, and the Act simply unilaterally provided for the opening of the Reservation.

The legislative history of these Acts strongly suggests that the Flathead bill was considered to be so similar to the others that separate debate was unnecessary. In the Senate, after extended debate on the Devils Lake bill, it was apparently agreed that all four bills

would be considered together without extended debate.[5] See 38 Cong. Rec. 4984 (1904) (remarks of Sen. Allison); Helena Independent, April 19, 1904, at 1, Col. 2 (Polson District Ct. Ex. 14). Moreover, in regard to the Crow bill, Senator Platt stated:

> This bill is one of four bills which have already passed in the House of Representatives for the opening of reservations . . . . It does not differ substantially from the three bills which we have already passed, and they all ought to go together.

38 Cong. Rec. 5183 (1904) (emphasis added).

In examining the intent of Congress as to the Flathead Act, the purpose of these other contemporaneous Acts must therefore be given considerable weight as part of the legislative context of the Flathead Act. It is virtually inconceivable that without once discussing

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5. The Devils Lake bill was the first to be brought up in the Senate, on April 2, 1904, but met with opposition on the issue of the method of payment for the surplus lands. 38 Cong. Rec. 4138-39. See generally Rosebud at 592-96. The bill was brought up twice more on April 14 and 16, 1904, and met with the same resistance. 38 Cong. Rec. 4674-76, 4914-25. On Monday, April 18, the Rosebud and Devils Lake bills were passed in quick succession without debate. Id. at 4984-88. Senator Gibson of Montana then obtained the floor to introduce the Flathead bill, but was interrupted briefly for the consideration of another bill. Id. at 4988-92. The Senate then passed the Flathead bill, also without debate. Id. at 4993. Finally, the Crow bill was brought up and approved by the Senate two days later on April 20, 1904. Id. at 5182-84.

the point, Congress intended these similar acts, which concerned the same general subject matter and which were considered at the same time, to have profoundly different results. The legislative history discloses no sound basis on which to distinguish the Flathead Act from the Rosebud and Crow Acts, and the intent of Congress with respect to each Act must be considered to have been the same.

This conclusion is bolstered by the legislative history to the 1909 amendment adding the prohibition on intoxicants. The Senate Report relating to the amendatory act stated that the provision "extends to all the lands formerly constituting the reservation the restrictions as to the sale of intoxicants. It is unnecessary to say that this would be very advantageous." S. Rep. No. 1036, 60th Cong., 2d Sess. at 17-18 (1909) (emphasis added). Thus, it is beyond question that Congress included this provision, as it did in the 1910 Rosebud Act, because it believed that the 1904 Act disestablished the Reservation. See Rosebud, supra, at 613-14 n.47.

d. The subsequent jurisdictional history.

In resolving questions of reservation disestablishment, this Court has looked to the jurisdictional history of the original reservation area subsequent to the passage of the statute, as one element of its analysis. See Rosebud, supra at 603-05; DeCoteau, supra at 442-44. There is no dispute that from the opening of the original Reservation at least until 1951, Montana and its political

subdivisions assumed complete jurisdiction over both Indians and non-Indians on non-trust lands within the original reservation boundaries.[6] See Confederated Salish & Kootenai Tribes v. Namen, Civ. No. 2343, at 30-31 (D. Mont. April 8, 1980) (State App. B). As this Court noted in Rosebud, supra, this long-standing assumption of jurisdiction by State and local authorities "demonstrates the parties' understanding of the meaning of the Act," and is entitled to some weight. Id. at 604-05.

The understanding of federal officials regarding the purpose of the 1904 Act is further demonstrated by numerous references to the "former" reservation and the like contained in letters, decisions, and memoranda of the Department of the Interior. See, e.g., Opinion of the Solicitor No. M-11410, I Op. Sol., Indian Affairs 99, 100, 101 (1924); John B. Elie, 48 I.D. 59, 61 (1921); Regulations for Sale of Unsold and Unreserved Lots, 47 I.D. 175 (1919); Villa Site Regulations, 44 I.D. 39, 39 (1915); Frank D. Griffin, 41 I.D. 521, 522 (1913). The understanding of Department of Interior officials is

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6. Criminal jurisdiction was continuously exercised in the area by State authorities until the 1951 Montana Supreme Court decision in State ex rel. Irvine v. District Court, 125 Mont. 398, 239 P.2d 272. Without deciding the question of disestablishment presented by this case, the Court in Irvine held that fee-patented land within the boundaries of the original Reservation was "Indian country" under the revised definition of "Indian country" set forth in 18 U.S.C. § 1151(a).

further revealed by several Orders of Restoration issued by the Secretary of the Interior from 1936 to 1964. 1 Fed. Reg. 666; 3 Fed. Reg. 5; 21 Fed. Reg. 6681; 23 Fed. Reg. 3854; 26 Fed. Reg. 4015; 29 Fed. Reg. 16827. These orders restored certain unsold surplus lands to tribal ownership and to reservation status pursuant to Sections 3 and 7 of the Indian Reorganization Act of 1934, 25 U.S.C. §§ 463 and 467. It is therefore clear that the Secretary believed that the surplus lands were not theretofore part of an existing reservation.

It is evident that Congress itself shared this belief that the 1904 Act had disestablished the original Flathead Reservation. For instance, in the Act of July 17, 1914, 38 Stat. 510, Congress extended certain provisions of the general reclamation statutes to the "Flathead Irrigation project, in the former Flathead Indian Reservation." (emphasis added). In addition, in 1920 Congress authorized the State of Montana to select certain lands in lieu of school lands "within the boundaries of the former Flathead Reservation." Act of February 14, 1920, 41 Stat. 408, 421 (emphasis added).

B. The Decision of the Court of Appeals Fails to Apply the Relevant Principles in a Manner Consistent with the Recent Decisions of this Court.

As the above discussion demonstrates, use of the analysis required by this Court and reference to the specific holdings of Rosebud Sioux Tribe v. Kneip and DeCoteau v. District County Court compels a conclusion that the 1904 Flathead Act was intended to disestablish

the original Flathead Reservation. In reaching the opposite conclusion, the Court of Appeals failed to apply the relevant principles in a manner consistent with recent decisions of this Court.

1. The face of the Act.

First, the court below looked to the face of the 1904 Act at issue in this case, and relied heavily on the lack of express language indicating that the Flathead Reservation was to have been disestablished. 665 F.2d at 955-56 (State App. A). This reliance is misplaced, however. As this Court made clear in Rosebud, "the notion that such express language in the Act is the only method by which congressional action may result in disestablishment is quite inconsistent with [the proper inquiry]." 430 U.S. at 588 n.4 (emphasis in original). See also United States v. Wounded Knee, 596 F.2d 790, 794-95 n.7 (8th Cir.), cert. denied, 442 U.S. 921 (1979); Rosebud Sioux Tribe v. Kneip, 521 F.2d 87, 90 (8th Cir. 1975), aff'd, 430 U.S. 584 (1977). Thus, the presence of express language may be helpful as evidence of congressional intent, but it is certainly not a prerequisite to a finding of disestablishment. This principle is most clearly illustrated by the Court's determination in Rosebud that a 1907 surplus lands act was intended to disestablish the affected reservation area, despite the absence of any express language of disestablishment. 430 U.S. at 606-09.

The Court of Appeals discounted the similarity between the 1904 Flathead Act and the later Rosebud Acts, stating that this Court held that the latter acts diminished the Rosebud Reservation "only because of their perceived relationship to an earlier statute [the 1904 Rosebud Act] that contained explicit language of cession." This, however, misstates the holding of Rosebud. Although there is no doubt that the 1907 and 1910 Rosebud Acts bore a relationship to the 1904 Act, that fact certainly does not compel the conclusion that the cession language in the 1904 Act was the crucial and dispositive factor as to the subsequent Acts. On the contrary, the existence of a preceding cession statute affecting other lands in the Rosebud Reservation simply provided a frame of reference for the Court's examination of the 1907 and 1910 Acts. 430 U.S. at 607-08.

Although it acknowledged the holding in Rosebud regarding the school lands and intoxicants provisions in the Rosebud Acts, the Court of Appeals stated the "the presence of such provisions at best supports a finding reached on other grounds, and is by no means dispositive." 665 F.2d at 956. This dismissal of the school lands and liquor sections in the Flathead Act unduly discounts the detailed treatment given to similar provisions by this Court in Rosebud. See Rosebud at 599-601, 608 n.36, 611-14 and n.47. Far from being simply secondary support, the Rosebud provisions were relied upon by this Court as primary evidence of the purpose of the statutes there in question. As stated in the Rosebud opinion, the

"natural construction" of the school lands provision "is to read a congressional intent to disestablish" in that section. Id. at 601. Similarly, the Court in Rosebud stated that the liquor provision in the 1910 Rosebud Act "reflect[s] strongly" an intent to disestablish. Id. at 614. The virtually identical provisions in the Flathead Act are surely equally clear indications of the same intent.

2. The legislative history.

In its treatment of the legislative history of the 1904 Flathead Act, the Court of Appeals again made much of the absence of cession language, and held that the deletion of cession language in the bill at the suggestion of the Secretary of the Interior "strongly suggests congressional recognition that reservation lands were not being ceded, and hence that reservation status was not being terminated." 665 F.2d at 956. As before, this statement misapprehends the applicable principles as developed by this Court. There is no dispute that the deletion of the words "tract herein ceded" from the bill which would become the Flathead Act reflects an understanding on the part of the Secretary and of Congress that no actual cession of reservation lands was to take place. However, the fact that Congress recognized that the use of the word "ceded" was technically incorrect does not suggest in any way that Congress intended that the reservation was to remain intact. On the contrary, this Court has made it very clear that in 1904 Congress

was fully aware that it could effect a disestablishment by a unilateral act, as well as by way of a bilateral cession agreement. Rosebud at 587-88, 594, 598. The flaw in the argument of the court below is that it depends upon an assumption that the cession of lands is the only manner in which a reservation could be disestablished — an assumption put to rest in Rosebud. As noted above, the legislative history indicates that the revision of the bill was not intended to effect any change in the purpose of the legislation. What is important in this regard is that the legislation was perceived to have the same effect as a cession.

As noted above, the legislative history of the Flathead Act cannot be examined without considering the three other acts, including the 1904 Rosebud Act, which were passed at the same time and which were companion legislation to the Flathead Act. Despite the fact that Congress drew no distinction between the effect and purpose of the four acts, the Court of Appeals found the absence of a pre-existing cession agreement and the lack of cession language in the Flathead Act to be "salient differences". In declining to fully consider the legislative context of the Flathead Act, the Court of Appeals failed to engage in the comprehensive analysis mandated by this Court in Rosebud and DeCoteau.

3. The surrounding circumstances.

In its opinion, the Court of Appeals disputed the City's contention that the federal policy at the time the Flathead Act was passed was to disestablish existing Indian reservations, and discounted the relevance of any such policy. 665 F.2d at 957, 958. However, it is clear that one ultimate object of the prevailing policy of the era was the "gradual extinction of Indian reservations." Montana v. United States, 450 U.S. 544, 559 n.9 (1981). See also discussion, supra at 14-15. Although this does not mean that every piece of legislation of the period necessarily conformed with this policy, existing policy does serve as a useful backdrop against which legislation may be evaluated. As was pointed out in Oliphant v. Suquamish Indian Tribe, 435 U.S. 191, 206 (1978), treaties and statutes affecting Indians "cannot be interpreted in isolation but must be read in light of the common notions of the day and the assumptions of those who drafted them."

The Court of Appeals also did not view the 1886 and 1896 cession statutes, and the negotiations conducted between 1897 and 1901, as support for a conclusion of disestablishment. 655 F.2d at 958. Yet these statutes are clear indicia of congressional intent in the years preceding the enactment of the Flathead statute, and there is no reason to assume that this intent changed after negotiations with the Indians failed to achieve the desired result. Instead, the more logical assumption is that there was, as in Rosebud, an "implied continuity of purpose between 1901 and 1904." Id. at 598-99.

4. The subsequent jurisdictional history.

The Court of Appeals attempted to distinguish the jurisdictional history subsequent to the opening of the Flathead Reservation from the history of the original Lake Traverse and Rosebud Reservations discussed by this Court in DeCoteau, supra, 420 U.S. at 442-44, and in Rosebud, supra, 430 U.S. at 603-05. 665 F.2d at 959. While it is true, as the Court of Appeals noted, that the exercise of jurisdiction by the State was interrupted in 1951 by a decision of the Montana Supreme Court, the court below failed to consider two important factors. First, the 1951 decision in State ex rel. Irvine v. District Court, 125 Mont. 398, 239 P.2d 272, involved only the issue of whether townsites within the original boundaries of the Flathead Reservation were subject to State jurisdiction by virtue of the fact that the land was owned by non-Indians, and not the issue of whether the original reservation had been disestablished by the 1904 Act. More importantly, the fact remains that the State exercised unquestioned jurisdiction for approximately forty years following the opening of the reservation in 1910. This long-standing exercise of jurisdiction in the years immediately after the opening ought to be accorded far more weight than more recent developments.

The Court of Appeals acknowledged the numerous legislative and administrative documents which refer to

"the former Flathead Reservation" or otherwise demonstrate a clear perception on the part of federal officials that the reservation had been disestablished. 665 F.2d at 959. However, the court below dismissed this clear evidence of disestablishment on the basis of other documentary references which, claimed the court, "contradict" those adduced by the City. 665 F.2d at 959-60. An examination of these documents shows that they generally refer to "the Flathead Reservation" or similar descriptive phrases, without the use of the past-tense qualifiers such as "former." However, many similar present-tense references can be found in Interior documents relating to the former Lake Traverse Reservation which was found to have been disestablished in DeCoteau, supra. Id. at 442 n.27. Such "present-tense" references are easily explainable as convenient geographical designations of an area, which was once an Indian reservation, and in which there was a continuing federal presence by virtue of the substantial amount of Indian trust land[7] and a significant Indian population. See United States v. Oklahoma Gas & Electric Co., 318 U.S. 206, 216 (1943). This explanation is considerably more satisfactory than the suggestion that the responsible officials, in utter

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7. There is no question that the federal government retained significant responsibility over allotments and unsold surplus lands by virtue of the trust status of the lands. See, e.g., Ash Sheep Co. v. United States, 252 U.S. 159, 164-66 (1920); United States v. Pelican, 232 U.S. 442, 447-50 (1914).

confusion, continually vacillated between opposite perceptions of the status of the area. The use of the word "former" in this context is unambiguous and is susceptible to only one explanation, that is, that the original reservation was officially perceived to have been disestablished by the 1904 Act.

Finally, the Court of Appeals found great significance in the fact that the Presidential Proclamation opening the Flathead Reservation to settlement referred neither to a "cession" nor to the "former" reservation. 665 F.2d at 959. See Proclamation of May 22, 1909, 36 Stat. 2494. This reasoning is puzzling, however, given the absence of any such conclusion in Rosebud regarding substantially similar proclamations. See Presidential Proclamation of August 24, 1908, 35 Stat. 2203; Presidential Proclamation of June 29, 1911, 37 Stat. 1691.

CONCLUSION

From the foregoing discussion, it is clear that the decision of the Court of Appeals was decided in a manner inconsistent with the decisions of this Court, and will therefore serve to undermine the principles stated therein. In addition, the decision below will have far-reaching and lasting effects upon the way in which this part of Montana and its primarily non-Indian population are governed. Most importantly, the decision below illustrates the need for further definition of the principles outlined in the Court's decisions in Rosebud and DeCoteau. For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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